U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: [redacted] Office: Texas Service Center Date: NOV 1 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(B)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a higher education research and patient care institution. It seeks to classify the beneficiary as an outstanding professor or researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(B). The petitioner seeks to employ the beneficiary in the United States as a research associate and instructor. The director determined that the petitioner had not offered the beneficiary a permanent or tenure-track position, as required by the statute.

On appeal, the petitioner submits a modified job offer letter.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,
> > >
> > > (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
> > >
> > > (iii) the alien seeks to enter the United States --
> > >
> > > > (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
> > > >
> > > > (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
> > > >
> > > > (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Service regulations at 8 C.F.R. 204.5(i)(3)(iii)(A) and (B) reflect the statutory requirement that the job offered must be permanent, tenured, or tenure-track.

The petition was filed on June 24, 1999. In a letter accompanying the initial filing, counsel states without comment that the beneficiary "is offered a non-tenure track position" with the petitioner, making no reference to the disqualification that necessarily accompanies a job offer of this kind.

The initial filing contained letters from several faculty members from the petitioning institution, but no actual job offer. The director instructed the petitioner to submit the required job offer letter, along with other evidence. In response, the petitioner has submitted a copy of a letter dated September 4, 1998, indicating that the petitioner offered the beneficiary a position "at the rank of Instructor on a non-tenure track . . . for an initial three-year period."

The director denied the petition, because of the plainly-worded and unwaivable statutory requirement that the petitioner must offer the beneficiary a permanent or tenure-track position.

On appeal, counsel states that the "[p]etitioner's job offer letter to the beneficiary did not accurately state the terms of the beneficiary's employment." No evidence accompanies this assertion. Counsel asserts that further evidence is forthcoming.

Subsequently, the petitioner has submitted a letter from Professor [redacted] M.D., acting chairman of the Department of Pediatrics at the petitioning institution. Prof. [redacted] states "it is expected that [the beneficiary] will be promoted to Assistant Professor effective July 1, 2000. This would be a tenure track position." Prof. [redacted] adds that the beneficiary's current "position is of an indefinite duration depending on funding." He does not indicates that the present position is permanent, tenured, or tenure-track, nor does he repudiate any of the terms of the original job offer letter (which he and another university official had co-signed). A clause in that initial letter specifies that no changes made to the letter will have effect.

The new letter fails, for two reasons, to overcome the grounds for denial. First, the letter does not constitute an offer of a tenure-track position; rather, Prof. [redacted] speculates that the petitioner might, in the future, extend such an offer. Second, this letter is dated December 22, 1999, nearly six months after the petition's filing date. Even if it contained an actual job offer, rather than an "expectation" of one, the letter does not and cannot show that an offer of tenure-track employment existed on June 24, 1999. After the submission of Prof. [redacted] new letter, the

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petitioner ultimately promoted the beneficiary to a tenure-track position. Despite the petitioner's repeated submission of supplements to the record following the initial appeal, it remains that there is no evidence that any offer of tenure-track employment existed when the petition was filed. No subsequent alteration of the terms of the beneficiary's employment can compensate for this critical shortcoming in the initial petition.

A petition of this kind must be approvable as of its date of filing; it cannot be filed prematurely, on the expectation that as-yet-unfulfilled qualifying conditions will one day be met. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition; and Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Ex., July 13, 1998), in which the Service held that a petitioner cannot make material changes to a previously-filed petition in an effort to make an apparently deficient petition conform to Service requirements.

In this matter, the petitioner's job offer as of the petition's filing date did not meet the statutory requirements. Therefore, the petition was not approvable at the time it was filed. Any subsequent changes in the beneficiary's employment status with the petitioner should properly be addressed via a new visa petition, which can take into account those changes. This office takes no position on any issues in this petition apart from the stated grounds for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.